

## Fairness before the Mechanism for the International Criminal Tribunals

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## Fairness before the Mechanism for the International Criminal Tribunals

Yvonne McDermott\*

### 1. *Introduction*

The UN Security Council established the Mechanism for the International Criminal Tribunals (MICT) in 2010, to ‘continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR’.<sup>1</sup> The MICT is comprised of two branches – one for the International Criminal Tribunal for Rwanda (ICTR), which commenced its operations on 1 July 2012, and one for the International Criminal Tribunal for the Former Yugoslavia, which became operational on 1 July 2013.<sup>2</sup> Rather than being a body that carries out purely residual functions deriving from the ICTY and ICTR, it is more accurate to refer to the MICT as a new international criminal tribunal in its own right,<sup>3</sup> insofar as it was established by a separate UN Security Council Resolution,<sup>4</sup> and, as well

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<sup>1</sup> UNSC Res1966 (2010) UN Doc S/RES/1966 para 4.

<sup>2</sup> *ibid* para 1.

<sup>3</sup> R Frolich, ‘United Nations Security Council Resolution 1966: International Residual Mechanism for ICTY and ICTR’ (2011) 50 *Intl L Materials* 323, refers to the Mechanism’s ‘potentially misleading name’; G Tortora, ‘The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges’ 21 *ASIL Insights* (6 April 2017) <[www.asil.org/insights/volume/21/issue/5/mechanism-international-criminal-tribunals](http://www.asil.org/insights/volume/21/issue/5/mechanism-international-criminal-tribunals)> refers to the two categories of the MICT’s functions, some of which are purely residual functions, while the others are temporary functions derived directly from the ICTY and ICTR.

<sup>4</sup> Whether this fits within the Security Council’s remit under Chapter VII of the UN Charter is questionable; for a discussion, see G McIntyre, ‘The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (2011) 3 *Gottingen J Intl L* 923 and A Skander Galand, ‘Was the Residual Mechanism’s creation falling squarely within the Chapter VII power of the Security Council?’, in this issue.

as carrying out the residual functions of witness protection,<sup>5</sup> archive management,<sup>6</sup> detention supervision,<sup>7</sup> and responding to national authorities' requests for assistance, it also has the power to conduct trials,<sup>8</sup> re-trials, and appeals.<sup>9</sup>

To date, just under half of the MICT's decisions have been on protective measures for witnesses or requests from national authorities for access to information.<sup>10</sup> Currently ongoing before the MICT are the re-trial of *Stanisić and Simatović*<sup>11</sup> and the appeal of *Karadžić*.<sup>12</sup> The *Šešelj* case is at the pre-appeal stage,<sup>13</sup> while the *Hadžić* appeal ended with the death of the accused in 2016.<sup>14</sup> Regardless of the outcome in the *Mladić* Trial Judgment, expected in 2017, it is likely that one or both of the parties will appeal the judgment, and those appellate proceedings will also be heard by the MICT. The Mechanism is also currently hearing three alleged cases of wrongful conviction by the ICTR,<sup>15</sup> has issued a number of decisions on alleged contempt, and remains seized of two cases where the accused persons were transferred by the ICTR to Rwanda under Rule 11*bis* but have since sought revocation of those referrals on the basis that they cannot receive a fair trial in Rwanda.<sup>16</sup> In addition, the MICT deals

<sup>5</sup> Statute of the International Residual Mechanism for Criminal Tribunals, annexed to UNSC Res 1966 (2010) (n 1) (hereinafter 'MICT Statute') art 5.

<sup>6</sup> MICT Statute (n 5) art 27.

<sup>7</sup> MICT Statute (n 5) art 25.

<sup>8</sup> The MICT is expected to try high-profile ICTR fugitives Kabuga, Mpiryana, and Bizimana, if they are ever caught.

<sup>9</sup> Eg *Prosecutor v Ngirabatware* (Appeal Judgment) MICT-12-29-A (18 December 2014).

<sup>10</sup> 'Address to the UN Security Council' Judge Theodor Meron, President, Mechanism for International Criminal Tribunals, UNSC Verbatim Record (7 June 2017) UN Doc S/PV.7960, 6 (stating that 45% of the MICT's activity comprised of this type of decision).

<sup>11</sup> Case No MICT-15-96.

<sup>12</sup> Case No MICT-13-55.

<sup>13</sup> Case No MICT-16-99.

<sup>14</sup> Case No MICT-16-101.

<sup>15</sup> These are: Jean de Dieu Kamuhanda (Case No MICT-13-33), Augustin Ngirabatware (Case No MICT-12-29), and Eliezer Niyitegeka (Case No MICT-12-16).

<sup>16</sup> Eg *Prosecutor v Uwinkindi* (Decision on Requests for Revocation of an Order Referring a Case to the Republic of Rwanda) MICT-12-25-R14.3 (26 April 2017); *Munyarugarama v Prosecutor* (Decision on Appeal Against the Referral of Pheneas Munyarugarama's case to Rwanda and Prosecution Motion to Strike) MICT-12-09-AR14 (5 October 2012).

with issues such as alleged breaches of *ne bis in idem* by national proceedings against persons formerly tried by the international tribunals.<sup>17</sup>

This article seeks to examine the role of fairness before the MICT. In particular, it builds upon previous research in determining whether the highest standards of fairness can be expected of the MICT, in the same manner as is expected of international criminal tribunals.<sup>18</sup> It then examines some of the main procedural amendments that have been enacted by the MICT as compared to its predecessors. Lastly, this article points to a number of fair trial issues that have arisen in the early practice of the MICT, and discusses some issues that are likely to arise in future practice.

## 2. The MICT: Setting the highest standards of fairness?

Over the lifetimes of the *ad hoc* tribunals, and since the inception of the International Criminal Court (ICC), there has been a debate as to whether these international tribunals are obliged to set the highest standards of fairness in their procedural practices, or whether it suffices for their practices to be just ‘fair enough’.<sup>19</sup> I have argued elsewhere that one of the reasons why we should hold the international tribunals to respect the highest standards of fairness is the simple fact that they actively declare their procedures to respect best practices.<sup>20</sup> Conversely, then, any derogation from those high standards opens the door to less than fair prosecutions in domestic courts, insofar as those national administrations can claim that their practices reflect the highest standards as reflected in the practice of UN-established international courts.<sup>21</sup>

<sup>17</sup> *Prosecutor v Orić* (Decision on Second Motion Regarding a Breach of *Non Bis in Idem*) MICT-14-79 (10 December 2015) found that the proceedings in Bosnia and Herzegovina against Orić, who was fully acquitted by the ICTY Appeals Chamber in 2008, were based on different charges to the ICTY charges against him, and so no concern as to *ne bis in idem* arose.

<sup>18</sup> Y McDermott, *Fairness in International Criminal Trials* (OUP 2016) Ch 5.

<sup>19</sup> Compare, eg, MR Damaška, ‘Reflections on Fairness in International Criminal Justice’ (2012) 10 J Intl Criminal Justice 611, with McDermott (n 18) *ibid*.

<sup>20</sup> McDermott (n 18) 131-142.

<sup>21</sup> See eg US Senate, Committee on Armed Services, Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, 7 July 2009 (arguing that anonymous witness testimony could be used because it was permitted before the ICTY.)

The MICT is no different to its predecessors in confirming its commitment to creating an idealized model of fairness, based not on any one domestic procedural model but on a mixed or hybrid procedural framework. In a recent public speech, the MICT's Prosecutor noted that the 'fair trial is the cornerstone of any judicial process and that fairness is the yardstick by which any judicial system will be assessed.'<sup>22</sup> Furthermore, the MICT's website notes that 'the Mechanism maintains the legacies of these two pioneering *ad hoc* international criminal courts [the ICTY and ICTR] and strives to reflect best practices in the field of international criminal justice.'<sup>23</sup> It also emphasises that 'a competent and vigorous defence contributes to the Mechanism's credibility and legitimacy in the eyes of the international community.'<sup>24</sup> Thus, it is clear that the MICT firmly depicts itself as an exemplar in fully respecting the rights of the accused.

Moreover, I have argued elsewhere that the *ad hoc* tribunals' ability to refer cases under Rule 11*bis* of their Rules of Procedure and Evidence emphasises their role in setting the highest standards of fairness, because they cannot refer cases to national tribunals unless they are satisfied that the accused will receive a fair trial.<sup>25</sup> Implicit in this condition is the idea that the trial received domestically will be in accordance with the same standards established by the international tribunal. Equally, the MICT has the power to refer cases to domestic jurisdictions, but again, only when it is satisfied that the accused will not be subjected to the death penalty and will receive a fair trial.<sup>26</sup>

Lastly, this argument is supported by the MICT's clear preference for continuity from its predecessors. At the time of the establishment of the MICT, there was some concern that the Mechanism would not feel bound to follow the precedents of the ICTR and ICTY, and that this might lead to a lack of parity in treatment.<sup>27</sup> In practice, however, the MICT has emphasised the importance of the precedents set by the ICTR

<sup>22</sup> Press Release, 'MICT and ICTR Prosecutor Jallow hosts a high-level roundtable on promoting accountability' (2 December 2015) <[www.unmict.org/en/news/mict-and-ict-r-prosecutor-jallow-hosts-high-level-roundtable-promoting-accountability](http://www.unmict.org/en/news/mict-and-ict-r-prosecutor-jallow-hosts-high-level-roundtable-promoting-accountability)>.

<sup>23</sup> 'About the MICT' <[www.unmict.org/en/about](http://www.unmict.org/en/about)>.

<sup>24</sup> 'Defence' <[www.unmict.org/en/about/defence](http://www.unmict.org/en/about/defence)>.

<sup>25</sup> Rule 11*bis* ICTY and ICTR RPE. See further, McDermott (n 18) 151-155.

<sup>26</sup> MICT Statute (n 5) art 6(4).

<sup>27</sup> McIntyre (n 4).



and ICTY.<sup>28</sup> In noting the importance of ‘normative continuity’, the MICT has emphasised that ‘[t]hese parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice.’<sup>29</sup> Thus, if we are to accept that the ICTR and ICTY were obliged to respect the highest standards of fairness in their procedures, then those same standards apply equally to their successor institution, the MICT.

### 3. *Procedural changes in the MICT vis-à-vis the ICTR and ICTY*

Article 19 of the MICT Statute, on the Rights of the Accused, is almost identical to its equivalent statutory provisions – Article 20 of the ICTR Statute and Article 21 of the ICTY Statute. The only notable difference is the welcome addition of gender-neutral language in the MICT Statute – for example, ‘counsel of his own choosing’ becomes ‘counsel of his *or her* own choosing’. The MICT Rules of Procedure and Evidence (RPE) are closely modeled on the Rules of Procedure and Evidence of the ICTY and ICTR.<sup>30</sup> On their face, the MICT RPE may appear to be more detailed, being comprised of 155 Rules as compared to the ICTY’s 127 Rules. However, those 127 ICTY Rules include additional Rules *bis*, *ter*, and so on. So, to compare, the equivalent to the ICTY’s Rule 92*bis*, 92*ter*, 92*quater* and 92*quinquies* in the MICT RPE are Rules 110-113 inclusive, and thus the number of Rules in the MICT RPE does not suggest a more extensive set of procedural provisions than the ICTY or the ICTR. That being said, there are some notable divergences in the MICT RPE, and those are worthy of further elucidation below.

The majority of changes in procedure between the MICT and its predecessors concern issues of evidence and witnesses. Notably, Rule 32(B)

<sup>28</sup> *Prosecutor v Kamuhanda* (Decision on *Amicus* Prosecutor) MICT-13-33 (8 December 2015) para 15.

<sup>29</sup> *Prosecutor v Munyarugarama* (Decision on Referral) MICT-12-09 (5 October 2012) paras 4-5.

<sup>30</sup> UNSC Res 1966 (2010) (n 1) para 5, ‘Requests the Secretary-General to submit at the earliest possible date, but no later than 30 June 2011, draft Rules of Procedure and Evidence of the Mechanism, which shall be based on the Tribunals’ Rules of Procedure and Evidence subject to the provisions of this resolution and the Statute of the Mechanism, for consideration and adoption by the judges of the Mechanism.’

of the MICT RPE introduces an explicit commitment to a gender-sensitive approach to supporting victims and witnesses, which was not seen in the ICTY RPE. The commitment to pay due regard to the hiring of women in support units for victims and witnesses is removed in the MICT RPE, possibly reflecting the increased recognition of rape and sexual violence as being a crime that can be committed against both genders.<sup>31</sup>

The MICT RPE also contains some provisions on the preservation of evidence for the benefit of future trials, where a warrant of arrest has not been executed within reasonable time,<sup>32</sup> and detailed provisions on the protection of the International Committee of the Red Cross from being compelled to disclose information.<sup>33</sup> The ICRC's rights in this respect were, of course, explicitly acknowledged by the ICTY in *Simić*,<sup>34</sup> we might argue that Rule 10 of the MICT RPE is superfluous on that basis, especially in light of the Mechanism's commitment to continuity, as discussed above.

Unlike the ICTY RPE, the MICT has an explicit provision on trial in the absence of the accused, where he or she has made an initial appearance but later refuses to appear for trial.<sup>35</sup> This Rule is similar to the equivalent Rule 82*bis* in the ICTR RPE, but with some important additions. As well as the three provisos set out in Rule 82*bis* (that the accused has made an initial appearance; the Registrar has notified them of the requirement of presence at trial, and that their interests are represented by counsel), Rule 98 of the MICT RPE adds that the accused should be physically and mentally fit to attend trial and that he or she should have 'voluntarily and unequivocally waived', or forfeited, their right to be present at trial.<sup>36</sup> This adds an additional layer of protection of the right to be present at trial, but further elucidation is not provided as to when an accused person may be said to have 'forfeited' their rights in this respect.

<sup>31</sup> *Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/08 (21 March 2016).

<sup>32</sup> Rule 78, MICT RPE. The ICTR had a similar provision, in its Rule 71*bis*; there was no parallel provision in the ICTY RPE.

<sup>33</sup> Rule 10, MICT RPE.

<sup>34</sup> *Prosecutor v Simić et al* (Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness) IT-95-9-PT (27 July 1999).

<sup>35</sup> Rule 98, MICT RPE.

<sup>36</sup> Rule 98 (iii) and (iv), MICT RPE.

In addition, the phrasing from Rule 82*bis* of the ICTR RPE, that the continuation of trial in the absence of the accused will only be ‘for so long as his [or her] refusal persists’ has been removed, which is unfortunate.

The MICT Rules also contain some notable changes to judicial and administrative arrangements, which depart from the practice of the Mechanism’s predecessors. First, the provisions on contempt are unique in that they allow contempt proceedings to be carried out before a single judge,<sup>37</sup> while the ICTR and ICTY RPE envisioned that such proceedings would be held before a full Chamber of judges.<sup>38</sup> This provision in the MICT RPE has clearly been influential – in February 2016, the judges of the ICC adopted a provisional amendment to Rule 165 of the ICC RPE, allowing a single judge to exercise functions that would usually be carried out by a full Chamber in proceedings on alleged offences against the administration of justice.<sup>39</sup> Further, the MICT has jurisdiction to refer those charged with offences against the administration of justice, as well as those charged with serious crimes within the jurisdiction of the Mechanism, to national jurisdictions.<sup>40</sup> This is likely to be significant, as Article 70(4) of the ICC Statute envisions that contempt offences can be prosecuted by national jurisdictions instead of the Court.<sup>41</sup>

The MICT also has a pared-down structure for judges’ participation before the Mechanism.<sup>42</sup> Many functions that would have been undertaken by a Chamber before the ICTY and ICTR are to be carried out by a Single Judge (or a Duty Judge) before the MICT, including rulings on

<sup>37</sup> Rule 90, MICT RPE.

<sup>38</sup> Rule 77, ICTR RPE; Rule 77, ICTY RPE.

<sup>39</sup> ‘Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence’ (29 February 2016) para 3.

<sup>40</sup> MICT Statute (n 5) art 6(1).

<sup>41</sup> Art 70(4)(a), ICC Statute. See further, *Prosecutor v Bemba et al* (Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff) ICC-01/05-01/13-648 (21 October 2014), Dissenting Opinion of Judge Anita Ušacka, para 10 (‘I am convinced that the Court should have decided not to exercise its jurisdiction and requested that a State Party exercise jurisdiction pursuant to article 70 (4) of the Statute.’).

<sup>42</sup> Discussed further in A Carcano, ‘Of Efficiency and Fairness in the Administration of International Justice: Can the Residual Mechanism Provide Adequately Reasoned Judgments?’, in this issue.



non-disclosure;<sup>43</sup> the initial appearance of the accused;<sup>44</sup> granting requests for the taking of evidence by special deposition,<sup>45</sup> and dealing for requests for assistance in obtaining testimony of persons under the authority of the Mechanism.<sup>46</sup>

The foregoing analysis provides just a snapshot of some of the main procedural innovations in the MICT vis-à-vis its predecessors. There are other minor changes, including a more detailed Rule on the functions of the Registrar,<sup>47</sup> and changes to the languages provisions in the Rules for the MICT.<sup>48</sup> The above-mentioned Rule changes, however, illustrate the MICT's clear desire to be a leaner, more efficient, institution than its predecessors.<sup>49</sup> However, as Carsten Stahn has noted, "lean" justice should thus not turn into "cheap justice",<sup>50</sup> and it is thus important to examine the status of the right to a fair trial before the MICT, and some of the main fair trial issues that have come before the Mechanism in its practice to date, and that are likely to arise.

#### 4. *Fair trial rights before the MICT*

##### 4.1. *Retrial and the rights of the accused*

One of the ongoing cases before the MICT is the retrial of *Stanišić and Simatović*. The accused were transferred to the ICTY to stand trial

<sup>43</sup> Rule 53, MICT RPE

<sup>44</sup> Rule 64, MICT RPE. Rule 62, ICTY RPE and Rule 62, ICTR RPE state that this role can be carried out by 'the Trial Chamber or a judge thereof'.

<sup>45</sup> Rule 78(E), MICT RPE. Compare Rule 71*bis*(E), ICTR RPE.

<sup>46</sup> Rule 87, MICT RPE. Rule 75*bis* ICTY RPE envisions that these functions will be undertaken by a 'Specially Appointed Chamber', comprised of three judges of the Tribunal.

<sup>47</sup> Rule 31, MICT RPE; compare Rule 33, ICTR RPE and Rule 33, ICTY RPE.

<sup>48</sup> Rule 3, MICT RPE; compare Rule 3, ICTR RPE and Rule 3, ICTY RPE.

<sup>49</sup> See further, Carcano (n 42).

<sup>50</sup> C Stahn, 'Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist Chambers and the Turn to New Hybridity' *EJIL: Talk!* (23 September 2016) <[www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/](http://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers-and-the-turn-to-new-hybridity/)>.

in 2003;<sup>51</sup> on 30 May 2013, the Trial Chamber issued its judgment, acquitting both accused of all charges.<sup>52</sup> The Trial Chamber found that neither accused could be proven beyond reasonable doubt to share the *mens rea* required for a conviction under the Joint Criminal Enterprise mode of liability, and that the assistance rendered by both accused towards special units of the Serbian State Security Service was not specifically directed towards the commission of the crime to establish liability under aiding and abetting.<sup>53</sup> The Appeals Chamber found an error of law as regards JCE liability in the Trial Chamber's failure to provide a reasoned opinion on essential elements of this mode of liability; it also found that the Trial Chamber erred in law by requiring specific direction as an element of aiding and abetting liability.<sup>54</sup> The Appeals Chamber therefore ordered a retrial 'on all counts of the Indictment' on this basis.<sup>55</sup> It is worthy of note that two of the five Appeals Chamber judges issued dissents to this judgment.<sup>56</sup>

Before the MICT, the defence attempted to argue before the MICT that issues of both *res judicata* and *ne bis in idem* arose, insofar as the scope of the retrial extended beyond those allegations successfully appealed by the prosecution.<sup>57</sup> These arguments were unsuccessful; however, the MICT was more convinced of the defence's submissions on the presentation of new evidence by the Prosecution at retrial.<sup>58</sup> The Trial Chamber noted the risk that allowing such new evidence would prolong the proceedings even further,<sup>59</sup> and, mindful of the fact that the retrial effectively offered a second chance to the Prosecutor,<sup>60</sup> it limited the evidence that the prosecution could present at the re-trial to that originally

<sup>51</sup> Case information sheet, Case No IT-03-69 <[www.icty.org/x/cases/stanisisic\\_simatovic/cis/en/cis\\_stanisisic\\_simatovic\\_en.pdf](http://www.icty.org/x/cases/stanisisic_simatovic/cis/en/cis_stanisisic_simatovic_en.pdf)>.

<sup>52</sup> *Prosecutor v Stanišić and Simatović* (Judgement) IT-03-69-T (30 May 2013).

<sup>53</sup> *ibid.*

<sup>54</sup> *Prosecutor v Stanišić and Simatović* (Judgement) IT-03-69-A (9 December 2015).

<sup>55</sup> *ibid* para 131.

<sup>56</sup> *ibid* Separate and Partially Dissenting Opinion of Judge Carmel Agius; Dissenting Opinion of Judge Koffi Kumelio A Afande.

<sup>57</sup> *Prosecutor v Stanišić and Simatović* (Stanišić Defence Request to Stay the Proceedings until the Prosecution Respects the Principle of Finality and the Appeal Chamber's Order for Retrial) MICT-15-96-PT (27 October 2016).

<sup>58</sup> *Prosecutor v Stanišić and Simatović* (Decision on Stanišić's Request for Stay of Proceedings) MICT-15-96 (2 February 2017).

<sup>59</sup> *ibid* para 21.

<sup>60</sup> *ibid* para 22.

presented during trial.<sup>61</sup> The Chamber accepted that there may be exceptional circumstances where the evidence relied upon during the original trial has subsequently become unavailable; the Prosecutor may be permitted to present new evidence in such exceptional circumstances at re-trial, where it is deemed to be in the interests of justice.<sup>62</sup>

#### 4.2. *Resources for defence counsel*

At the establishment of the MICT, there were some concerns as to the sufficiency of arrangements for the payment of defence counsel.<sup>63</sup> Michael Karnavas, himself a defence lawyer serving before international criminal tribunals, noted that ‘Under the MICT – this new “lean and efficient” tribunal – defence counsel are expected to do a good deal of *pro bono* work.’<sup>64</sup> Indeed, it is worthy of note that Peter Robinson, counsel for both Ngirabatware and Kamuhanda before the MICT in their claims of wrongful conviction by the ICTR, is acting on a *pro bono* basis. Niyitegeka, who is also calling for a review of his alleged wrongful conviction by the ICTR, was assigned counsel for a limited period of three months to assist him in preparing his review,<sup>65</sup> but the MICT refused to allocate additional funds beyond that period, recalling that ‘as a matter of principle, it is not for the Mechanism to assist a convicted person whose case has reached finality with any new investigation he would like to conduct or any new motion he may wish to bring by assigning him legal assistance at the Mechanism’s expense.’<sup>66</sup>

While this principle that the Mechanism should not pay for legal assistance for those persons whose proceedings have reached their final judgment has been repeated in other decisions,<sup>67</sup> the MICT did grant

<sup>61</sup> *ibid* para 23.

<sup>62</sup> *ibid*.

<sup>63</sup> MG Karnavas, ‘The MICT Model: Panacea or Chimera?’ (26 September 2016) <<http://michaelgkarnavas.net/blog/2016/09/26/the-mict-model-panacea-or-chimera/>>.

<sup>64</sup> *ibid*.

<sup>65</sup> *Niyitegeka v Prosecutor* (Decision on Niyitegeka’s Request for Review and Assignment of Counsel) MICT-12-16-R (13 July 2015) para 14.

<sup>66</sup> *Niyitegeka v Prosecutor* (Decision on Niyitegeka’s Motion for an Extension of the Assignment of his Counsel) MICT-12-16-R (27 May 2016) para 7.

<sup>67</sup> See *In the Case Against Florence Hartmann* (Decision of the President on the Urgent Request for Legal Aid) MICT-15-87-ES (29 March 2016) para 13.

some limited legal assistance to Florence Hartmann to remunerate counsel for the purposes of assisting her in her challenge to her arrest and detention.<sup>68</sup> This and the Niyitegeka experience show that the principle can be derogated from in the interests of justice, although arguably the extent of the legal assistance provided to both convicted persons remains insufficient. However, the MICT has proven to be more flexible on the question of funding defence counsel than the ICTY in the *Karadžić* case. The ICTY's Registrar had determined, on the basis of two properties owned by Karadžić's wife, that he had the resources to pay for his own defence. The MICT Registrar initially followed this decision, but the MICT held that the Registry had erred in considering itself obliged to follow the ICTY's determination in this respect, and granted the accused legal aid.<sup>69</sup>

#### 4.3. *Monitoring domestic prosecutions of referred cases*

One of the MICT's most prominent areas of fair trial practice to date has been the monitoring of cases that have been referred to domestic jurisdictions pursuant to Rule 11*bis* of its predecessors' Rules of Procedure and Evidence. Pursuant to Article 6(5), 'The Mechanism shall monitor cases referred to national courts by the ICTY, the ICTR, and those referred in accordance with this Article, with the assistance of international and regional organisations and bodies.' In November 2013, the MICT issued a decision on the monitoring mechanisms, where it set out expectations for trial monitors.<sup>70</sup> It established that trial monitors should present only 'objective information' on possible impediments to or violations of the right to a fair trial and 'refrain from including in their reports any opinion, assessment, or conclusions regarding such violations or impediments unless otherwise directed.'<sup>71</sup> This is because it is for the Chamber,

<sup>68</sup> *ibid* para 16.

<sup>69</sup> *Prosecutor v Karadžić* (Decision on a Motion for Review of the Registrar's Decision on Indigence) MICT-13-55 (24 June 2016) 4, 6.

<sup>70</sup> *Prosecutor v Uwinkindi* (Decision on the Registrar's Submission Regarding the Monitoring Mechanisms in the *Uwinkindi* and *Munyagishari* Cases) MICT-12-25 (15 November 2013).

<sup>71</sup> *ibid* para 29.

and not the monitors, to determine whether the referral condition that the accused shall receive a fair trial is still met.<sup>72</sup>

It is not beyond the bounds of possibility that the MICT might one day find that the accused can no longer receive a fair trial in the domestic state and rescind the referral. Most recently, in the *Uwinkindi* case, the Chamber noted fair trial concerns, such as the accused's inability to communicate confidentially with counsel, but also noted that these issues were being considered by the Rwandan authorities and, as such, were not 'ripe for current consideration as a basis for revocation pursuant to Article 6(6) of the Statute.'<sup>73</sup> On that basis, the accused's request was denied, but without prejudice to any further requests, should the situation not be sufficiently resolved.<sup>74</sup> This highlights a flexible and open approach to referred cases, and the MICT's clear willingness to revoke such referrals, should a fair trial become impossible.<sup>75</sup>

#### 4.4. *Judicial independence*

One of the most unexpected and unprecedented fair trial issues to arise before the MICT has been the arrest and detention of Judge Aydin Sefa Akay, a member of the Chamber considering the alleged wrongful conviction of Ngirabatware, in his native Turkey in September 2016. Judge Akay's arrest was purportedly in connection with a failed coup in July 2016, which was quickly followed by the arrest of some 50,000 people, including lawyers, judges, academics, and journalists.<sup>76</sup> Judge Akay was sentenced to seven and a half years' imprisonment in June 2017 for

<sup>72</sup> *ibid* para 28. See further, H Bubacar Jallow, 'Rule 11bis: The ICTR Legacy in Rwanda' in C Riziki Majinge (ed), *Rule of Law Through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (Cambridge Scholars Publishing 2015) 106.

<sup>73</sup> *Prosecutor v Uwinkindi* (Decision on Requests for Revocation of an Order Referring a Case to the Republic of Rwanda) MICT-12-25-RI4.3 (26 April 2017) 4.

<sup>74</sup> *ibid*.

<sup>75</sup> See also O Windridge, 'Gone But Not Forgotten—The Ongoing Case of Jean Uwinkindi at the ICTR and MICT' *Opinio Juris* (29 July 2015) <<http://opiniojuris.org/2015/07/29/guest-post-gone-but-not-forgotten-the-ongoing-case-of-jean-uwinkindi-at-the-ictr-and-mict/>>.

<sup>76</sup> 'Turkey arrests Amnesty International head and lawyers in Gulenist sweep' *The Guardian* (7 June 2017) <[www.theguardian.com/world/2017/jun/07/turkey-arrests-amnesty-international-head-and-lawyers-in-gulenist-sweep](http://www.theguardian.com/world/2017/jun/07/turkey-arrests-amnesty-international-head-and-lawyers-in-gulenist-sweep)> (last accessed 18 June 2017)>.



‘membership of a terrorist organisation’,<sup>77</sup> despite the fact that he is entitled to diplomatic immunity,<sup>78</sup> described as ‘cornerstone of an independent international judiciary, as envisaged by the United Nations’.<sup>79</sup> The MICT has held that Turkey has failed to comply with its obligations under Article 28 of the Statute, and has referred the matter to the UN Security Council,<sup>80</sup> but to date, no action has been taken. Since Judge Akay’s detention, proceedings in the *Ngirabatware* case have remained at a standstill.<sup>81</sup> The frustration of President Meron, in his June 2017 appearance before the Security Council, was palpable, but the Security Council has thus far been unwilling to intervene in the matter against Turkey. Meanwhile, Ngirabatware, who maintains his innocence, has been imprisoned, and his application for provisional release failed because the MICT lacks competence to consider a request for provisional release from an individual who, rather than being on trial in the sense of most provisional release requests, has already been finally convicted.<sup>82</sup>

#### 4.5. *Right to a reasoned judgment*

A likely issue to arise in the proceedings before the MICT is the level of reasoning on the evidential record required to sustain a Chamber’s findings. This is a debate that is very much to the fore in contemporary international criminal law practice,<sup>83</sup> and we can witness it in the *Stanišić and Simatović* Appeals Judgment, discussed above. There, as shall be recalled, the Appeals Chamber found the Trial Chamber’s judgment to be insufficiently reasoned, but ironically, the dissenting judges found the Appeals Chamber’s judgment to be lacking in reasoning. Judge Agius criticized the Majority’s decision, saying it ‘neither attempts to conduct a

<sup>77</sup> ‘Turkey sentences U.N. war crimes judge on “terrorism” charges: Hague’ Reuters (15 June 2017) <[www.reuters.com/article/us-turkey-coup-un-judge-idUSKBN1960XO?il=0](http://www.reuters.com/article/us-turkey-coup-un-judge-idUSKBN1960XO?il=0)>.

<sup>78</sup> *Prosecutor v Ngirabatware* (Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay) MICT-12-29-R (31 January 2017).

<sup>79</sup> *ibid* 5.

<sup>80</sup> *Prosecutor v Ngirabatware* (Decision on Republic of Turkey’s Non-Compliance with its Obligation to Cooperate with the Mechanism) MICT-12-29-R (6 March 2017).

<sup>81</sup> Meron (n 10).

<sup>82</sup> *Prosecutor v Ngirabatware* (Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay) MICT-12-29-R (31 January 2017) para 17.

<sup>83</sup> For a detailed discussion, see Y McDermott, ‘Strengthening the Evaluation of Evidence in International Criminal Trials’ (2017) 17 Intl Criminal L Rev (forthcoming).

review, nor offers any explanation as to how the Trial Chamber's error invalidated its findings with respect to Stanisic's and Simatovic's *mens rea*,<sup>84</sup> while Judge Afande's dissent noted that, 'instead of making a holistic reading of the Trial Judgment', the Majority had analysed the Trial Chamber's examination of the evidence 'in a piecemeal manner'.<sup>85</sup> This issue is likely to be important as the MICT decides how to evaluate the evidence before it at retrial.

Similarly, some findings of the ICTY Trial Chamber's judgment in *Karadžić* have been criticized as being perhaps unfounded in the evidential record. Noting the Chamber's findings on Karadžić's conviction for genocide in Srebrenica, Marko Milanović noted that:

'The whole reasoning rests on what inferences can be drawn from Karadzic's contacts with Deronjic. And while it's clear to me that a reasonable inference is that Karadzic was informed about the killings, it's not as clear that this is the ONLY such reasonable inference, which is what the beyond a reasonable doubt evidentiary standard requires. For example, the phone conversation with Deronjic could be interpreted as Karadzic's agreement with the forcible removal of the Bosniak males, but not necessarily with their extermination.'<sup>86</sup>

This is an issue that is very likely to arise on appeal before the MICT. These examples show that the debate is still very much alive on the level of judicial analysis of the evidential record required to sustain a conviction, and the judges of the international criminal tribunals are clearly still divided between a preference for holistic or for atomistic approaches to the evidence.<sup>87</sup>

#### 4.6. *Supervision of imprisonment*

A final noteworthy issue, which is not a fair trial rights issue *per se*, but is relevant to the rights of the accused in a broad sense, is the super-

<sup>84</sup> Agius (n 56) para 10

<sup>85</sup> Afande (n 56) para 3.

<sup>86</sup> M Milanovic, 'ICTY Convicts Radovan Karadzic' EJIL: Talk! (25 March 2016) <[www.ejiltalk.org/icty-convicts-radovan-karadzic](http://www.ejiltalk.org/icty-convicts-radovan-karadzic)>.

<sup>87</sup> McDermott (n 83).

vision of sentences of imprisonment, and broader issues of the future status of the MICT as a Tribunal that this issue gives rise to. Article 25(1) of the MICT Statute subjects imprisonment by convicted persons in the territory of states to the supervision of the Mechanism. It is anticipated that some persons convicted by the ICTY, ICTR, and the MICT will still be serving their sentences by 2030.<sup>88</sup> However, the Mechanism was established to operate only for an initial period of four years, from 2012 to 2016, with reviews on whether to continue to operate the MICT to be carried out every two years thereafter.<sup>89</sup> At each biennial review, the mandate of the MICT can be extended for a further two years, unless the Security Council decides otherwise.<sup>90</sup> Thus, it seems unlikely that the Mechanism will still be in existence by the end of the last convicted person's sentence, leaving a vacuum as to who will monitor and supervise sentences of imprisonment in the MICT's wake. Rule 128 of the MICT RPE notes that the Security Council 'may designate a body to assist it and to proceed to supervise the sentences after the Mechanism legally ceases to exist', but the status and character of such a body is far from certain and is likely to be subject to legal challenge, should it be so designated.

## 5. Conclusion

The MICT, as an international criminal tribunal, has been subjected to surprisingly little scrutiny in the literature, perhaps because it has been somewhat overshadowed by its predecessors, the ICTY and ICTR, and its contemporaries, including the ICC, to date. This article sought to address that lacuna by examining issues surrounding the fairness of proceedings before the MICT, and to situate the developments of international criminal procedure by the Mechanism's legal framework in context.

This article argued, first, that the MICT should be expected to reflect the highest standards of fairness in the same manner as its predecessors have borne this standard-setting function. While some may argue that it

<sup>88</sup> R Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 191.

<sup>89</sup> UNSC Res 1966 (2010) (n 1) para 17.

<sup>90</sup> *ibid.*



is unreasonable to expect the MICT, as a ‘residual’ tribunal, to carry out this role, it is clear that the MICT is more than a purely residual judicial institution – being established by Security Council Resolution to hold the same powers as the ICTY and ICTR, it is best classified as a new international criminal tribunal in its own right. Moreover, the MICT has expressly portrayed itself as an institution that fully respects the rights of the accused and reflects ‘best practices’. This argument is further bolstered by the MICT’s role in the supervision of referrals to national jurisdictions, and revoking such referrals if the accused cannot receive a fair trial – implicit in this function is the assumption that the MICT itself fully respects the rights of the accused.

This article also examined the major procedural innovations introduced by the MICT. While the Mechanism’s procedural framework is closely modeled on those of its predecessors, it has introduced some interesting changes, especially for proceedings against the administration of justice, which can be heard by a single judge (a novelty now reflected in the ICC’s Rules of Procedure and Evidence, as provisionally amended), and which also can be referred to domestic jurisdictions. Further, some streamlining in the role of judges can be seen, with single judges undertaking some of the functions that would previously have been undertaken by full Chambers in the ICTY and ICTR. The provisions on trial in the absence of the accused are an improvement on equivalent protections in the ICTR’s Rules in some respects, in that they introduce additional requirements for proceeding in the absence of the accused, but are less rights-protective in other ways, including the lack of a limiting clause and the introduction of the idea of the accused having ‘forfeited’ his or her right to be present at trial, without further articulation of what such a forfeit might look like.

The final part of this article examined the main fair trial issues that have arisen in the MICT’s practice to date, or that are likely to arise in the future. These included: the consequences for judicial independence arising from the arrest and imprisonment of Judge Akay; the insufficiencies in funding for defence counsel practicing before the MICT; the issues surrounding retrial, including alleged breaches of the *res judicata* and *non bis in idem* principles, and the introduction of new evidence by the prosecution at retrial; the MICT’s role as a monitor of referrals; issues surrounding judicial reasoning, and the continued supervisory role of the



MICT over sentences when its mandate is severely time-limited. This array of issues highlights the need for international criminal law scholars to continue to monitor the law and practice of this unique new tribunal closely, and to hold it to account for any deficiencies in its fair trial practices, as it develops over the coming months and years.